

128 FERC ¶ 61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Central Maine Power Company

Docket No. ER09-938-000

ORDER ACCEPTING PROPOSED TARIFF SHEETS AND DIRECTING
COMPLIANCE FILING

(Issued August 7, 2009)

1. On April 1, 2009, as supplemented on June 8, 2009, Central Maine Power Company (Central Maine) submitted for filing under section 205 of the Federal Power Act¹ revisions to the ISO New England Inc. (ISO New England) Open Access Transmission Tariff (Tariff). The proposed revisions would amend the Attachment F Implementation Rule and Schedule 21-CMP of the Tariff to implement certain transmission rate incentives authorized by the Commission in October 2008.² For the reasons discussed below, we accept the revised tariff sheets for filing, subject to the outcome of the proceeding in Docket No. EL08-74-001. We also direct Central Maine to submit a compliance filing, as discussed below. Finally, pursuant to section 206 of the Federal Power Act,³ we direct ISO New England to revise Attachment F of the Tariff to remove the requirement that changes to the Attachment F Implementation Rule filed pursuant to section 3.04(a) of the Transmission Operating Agreement (TOA) between ISO New England and the New England transmission owners must be approved by the Participating Transmission Owners Administrative Committee and to submit a revised tariff sheet, as discussed below.

¹ 16 U.S.C. § 824d (2006).

² *Central Maine Power Co.*, 125 FERC ¶ 61,079 (2008) (October 2008 Order).

³ 16 U.S.C. § 824e (2006).

I. Background

A. Authorization of Incentives

2. In the October 2008 Order, the Commission authorized transmission rate incentives pursuant to Order No. 679⁴ for Central Maine's proposed Maine Power Reliability Program Project (Project).⁵ The Commission authorized a 125 basis point return on equity (ROE) adder, recovery in rate base of 100 percent of construction work in progress (CWIP), and guaranteed recovery of 100 percent of prudently incurred costs if the Project is abandoned in whole or in part as a result of factors beyond Central Maine's control (abandonment).

3. In authorizing CWIP, the Commission required Central Maine to submit a subsequent section 205 filing to implement a stand-alone balancing account mechanism for the recovery of its CWIP revenue requirement. The Commission stated that Central Maine must provide a detailed explanation of its accounting methods and procedures to: (1) implement a stand-alone balancing account mechanism; (2) comply with sections 35.13(h)(38)⁶ and 35.25⁷ of the Commission's regulations; and (3) maintain comparability of financial information. The Commission also required Central Maine to submit annual FERC-730 reports.⁸

B. New England's Rate Structure

4. In New England, transmission owners recover transmission revenue requirements through a combination of local and regional rates. In general, each transmission owner maintains a Local Network Service Schedule that includes a formula rate used to calculate the total transmission revenue requirement for all of its transmission facilities.

⁴ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

⁵ The Project involves construction of approximately 255 miles of new and rebuilt 345 kV transmission line, 229 miles of new and rebuilt 115 kV transmission line, and upgrades to Central Maine's existing substations. *See* October 2008 Order, 125 FERC ¶ 61,079 at P 3.

⁶ 18 C.F.R. § 35.13(h)(38) (2009).

⁷ *Id.* § 35.25.

⁸ October 2008 Order, 125 FERC ¶ 61,079 at P 82.

Each transmission owner then subtracts from this total transmission revenue requirement the revenues that it receives from other sources, such as the provision of Regional Network Service. The transmission owners credit the revenues from Regional Network Service (and other sources) against their total transmission revenue requirements and recover the remainder from local customers.

5. The Regional Network Service rate recovers costs for service over pool transmission facilities that are eligible for regional cost allocation.⁹ To determine the Regional Network Service rate, each transmission owner must calculate its annual revenue requirement for its eligible facilities pursuant to the revenue requirement formula in the Attachment F Implementation Rule. These individual revenue requirements are then aggregated into a single revenue requirement and divided by a similarly aggregated monthly coincident peak.

II. Central Maine's Filing

A. Proposed Revisions to the Tariff

6. Central Maine proposes to revise the revenue requirement formula in the Attachment F Implementation Rule to add CWIP for its Project as one of the line items in the formula, thereby allowing it to include CWIP in rate base for its Project through the regional rate. Central Maine estimates that it will include 97.4 percent of its CWIP this way, and argues that regional allocation of CWIP is consistent with how the rest of the Project's costs will likely be allocated.¹⁰

7. Central Maine also proposes to modify Schedule 21-CMP, its Local Network Service Schedule, to allow for local recovery of any Project CWIP that is deemed ineligible for recovery in the regional rate (currently estimated at approximately 2.6 percent). Additionally, Central Maine proposes to exclude Project CWIP collected through the Regional Network Service rate from the revenues for Regional Network Service and Through and Out Service that are collected by ISO New England, distributed

⁹ Not all pool transmission facilities are eligible for regional cost allocation. ISO New England determines which pool transmission facilities are eligible for regional cost allocation pursuant to Schedule 12 of the Tariff.

¹⁰ The Project is a Reliability Transmission Upgrade in ISO New England's Regional System Plan. Consequently, the Project is eligible for region-wide cost allocation, subject to the outcome of ISO New England's cost allocation determinations under Schedule 12 of the Tariff.

to Central Maine, and credited to local customers.¹¹ Finally, Central Maine proposes to allow local recovery of the 125 basis point ROE adder to the extent that any portion of the Project is deemed ineligible for regional cost allocation.

8. Prior to submitting its filing, Central Maine discussed its proposed revisions to the Attachment F Implementation Rule with the relevant stakeholder committees and requested an advisory vote by the NEPOOL Participants Committee (NEPOOL). The vote failed; the proposed revisions received the support of 64.36 percent of the votes, short of the 66.667 percent necessary to earn NEPOOL's support.¹²

9. Following the failed stakeholder vote, Central Maine unilaterally submitted the proposed revisions to the Attachment F Implementation Rule (together with its proposed revisions to Schedule 21-CMP) to the Commission pursuant to section 3.04(a)(i) of the TOA between ISO New England and the New England transmission owners.¹³ Central Maine claims that it has the right to unilaterally propose revisions to the Attachment F Implementation Rule because section 3.04(a)(i) allocates to each individual transmission owner the right to unilaterally submit section 205 filings that establish and revise the revenue requirements for their transmission facilities, and the Attachment F Implementation Rule is the formula rate by which transmission owners must calculate their revenue requirements for Regional Network Service.

¹¹ Central Maine states that the incremental revenues associated with Commission authorized ROE adders for participation in a Regional Transmission Organization and new transmission investment are treated in a similar manner.

¹² The vote was divided by segment as follows: Generation—17.16 percent; Transmission—17.16 percent; Supplier—17.17 percent; Alternative Resources—0.00 percent; Publicly Owned Entity—0.00 percent; and End User—12.87 percent.

¹³ Section 3.04(a)(i) provides that:

(a) Each [Participating Transmission Owner] . . . shall have the authority to submit filings under [s]ection 205 of the Federal Power Act . . .to establish and to revise:

(i) the revenue requirements for all Transmission Facilities of such [Participating Transmission Owner] used for the provision of Transmission Service (including Transmission facilities leased to the [Participating Transmission Owner] or to which the [Participating Transmission Owner] has contractual entitlements)[.]

B. Compliance with Requirements for CWIP Recovery Specified in the October 2008 Order

10. Central Maine claims that its filing complies with the requirements for inclusion of CWIP in rate base set forth in the October 2008 Order and sections 35.13(h)(38) and 35.25 of the Commission's regulations.

11. Central Maine states that section 35.13(h)(38) of the Commission's regulations requires the filing utility to submit a Statement BM to: (1) describe generally its program for providing reliable and economic power for a specific period; (2) demonstrate that the project was selected based on an assessment of alternatives; and (3) provide an explanation of why the program adopted is prudent and consistent with a least-cost energy supply program. Central Maine states that it has submitted the information required by section 35.13(h)(38) and Statement BM as an attachment to its filing. Central Maine notes specifically that the Project is necessary to meet the reliability needs identified in a needs assessment study conducted by Central Maine under the direction of ISO New England.¹⁴

12. Central Maine states that sections 35.25(e) and (f) of the Commission's regulations require a CWIP applicant to discontinue the accrual of allowance for funds used during construction (AFUDC) for investments that are included in rate base and to propose accounting procedures that ensure that customers will not be double charged for AFUDC and CWIP. Central Maine claims that it maintains accounting records to ensure that capital costs are recorded with sufficient detail.

13. Central Maine states that, pursuant to the Commission's Uniform System of Accounts, CWIP balances are typically subject to AFUDC, which increases the asset balance for the cost of funds during construction in Account No. 107 (Construction Work in Progress). Central Maine states, however, that no AFUDC will accrue in Account No. 107 because it will include CWIP in rate base during the construction period. Central Maine further states that during construction and after the Project is placed into service it will use the SAP plant accounting system to maintain its accounting records for CWIP electric plant assets.¹⁵ Central Maine claims that this accounting system provides the controls and capability necessary to separately identify and track all work orders specific to the Project, guaranteeing that no AFUDC will be capitalized once CWIP is included in rate base. Central Maine also states that it will identify in SAP all construction work orders subject to the CWIP incentive, and that once CWIP is included in rate base, no AFUDC will be calculated on their balances. Central Maine argues that

¹⁴ See October 2008 Order, 125 FERC ¶ 61,079 at P 2 & n.3

¹⁵ Central Maine Initial Filing, Exhibit No. CMP-100 at 6.

its approach will prevent over and double-recovery of CWIP and capitalized AFUDC, and claims that it is consistent with accounting systems previously approved by the Commission.¹⁶ Additionally, Central Maine states that because the Project consists exclusively of Commission-jurisdictional facilities, there is no ratemaking overlap with state or local regulatory authorities, and therefore, no possibility of duplicate recovery of CWIP and AFUDC as a result of different accounting or ratemaking treatments by state or local authorities.

14. Central Maine states that section 35.25(g) of the Commission's regulations requires a CWIP applicant to provide additional information regarding the potential anti-competitive impacts of including CWIP in rate base, including the proposed CWIP levels included in wholesale and retail rates. Central Maine claims that its application does not raise any anticompetitive concerns. Central Maine also states that it provides service on an open-access basis pursuant to ISO New England's Tariff, and that its rates are consistent with the Commission's requirements.

15. Finally, Central Maine states that in order to promote comparability of financial information, it will use footnote disclosures to account for the economic effects of including CWIP in rate base. Central Maine argues that the Commission has previously approved this approach.¹⁷

C. Requested Waivers and Effective Date

16. Central Maine requests waiver of section 35.13 of the Commission's regulations, which requires utilities to provide certain cost-of-service information. Central Maine argues that since the Project's cost will be included in a Commission-approved formula rate, there is no need to submit cost-of-service information to support a rate increase for new transmission assets. Central Maine also claims that there is no need to provide cost-of-service information for the proposed incentive rates because they involve the application of different inputs to the Commission-accepted formula. Therefore, Central Maine argues that there is no need or no benefit gained from them submitting the cost-of-service information in the Commission's regulations, including Statements AA through BI.

¹⁶ *Id.* at 9 (citing *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248, at P 79 (2008) (*Tallgrass*) and *Pepco Holdings, Inc.*, 125 FERC ¶ 61,130 at P 102 (2008) (*Pepco*)).

¹⁷ *Id.* at 10.

III. Notice of Filing and Responsive Pleadings

17. Notice of the filing was published in the *Federal Register*,¹⁸ with protests and interventions due on or before April 22, 2009. The Attorney General of the Commonwealth of Massachusetts (Massachusetts Attorney General), the Connecticut Municipal Electric Energy Cooperative, NSTAR Electric Company, and the Public Advocate of the State of Maine (Maine Public Advocate) filed motions to intervene. NEPOOL filed a motion to intervene and comments. New England Consumer-Owned Systems (NECOS)¹⁹ filed a motion to intervene and a protest. National Grid USA (National Grid) and Northeast Utilities Service Company (Northeast Utilities) filed a joint motion to intervene and joint comments. The Massachusetts Municipal Wholesale Electric Company and the New Hampshire Electric Cooperative, Inc. (together the Joint Protesters) filed a joint motion to intervene and a joint protest. The Maine Public Utilities Commission (Maine PUC) filed a notice of intervention and a joint protest with the Maine Public Advocate (collectively, the Maine Parties). The Massachusetts Department of Public Utilities filed a notice of intervention and joint protest with the Massachusetts Attorney General (collectively, the Massachusetts Parties).

18. In general, the protesters challenge Central Maine's right under the TOA to unilaterally propose revisions to the Attachment F Implementation Rule, contest Central Maine's timing and accounting practices, and urge the Commission to reject Central Maine's filing as failing to provide all of the information required by the Commission in the October 2008 Order. In the alternative, the Maine and Massachusetts Parties request that the Commission set the case for paper hearing.

19. Central Maine filed a motion for leave to answer and an answer to the protests. The Maine Parties filed a joint answer to Central Maine's answer. NECOS filed an answer to Central Maine's answer.

¹⁸ 74 Fed. Reg. 16854 (2009).

¹⁹ The New England Consumer-Owned Systems include: Belmont Municipal Light Department, Braintree Electric Light Department, Concord Municipal Light Plant, Groton Electric Light Department, Hingham Municipal Lighting Plant, Littleton Electric Light and Water Department, Middleborough Gas & Electric Department, Pascoag Utility District, Reading Municipal Light Department, Taunton Municipal Lighting Plant, Templeton Light & Water Plant, and Wellesley Municipal Light Plant.

IV. Deficiency Letter and Response

20. On May 28, 2009, Commission staff issued a deficiency letter requesting information about various aspects of Central Maine's filing. On June 8, 2009, Central Maine submitted a response.

21. Notice of Central Maine's deficiency letter response was published in the *Federal Register*,²⁰ with comments due on or before June 30, 2009. NECOS and the Maine Parties filed separate protests. ISO New England filed a motion to intervene out-of-time and comments in response to NECOS's protest. Central Maine filed a motion for leave to answer and an answer.

V. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure²¹ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

23. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,²² the Commission will grant ISO New England's motion to intervene out-of-time given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²³ prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers or the answers to answers and will, therefore, reject them.

²⁰ 74 Fed. Reg. 30059 (2009).

²¹ 18 C.F.R. § 385.214 (2009).

²² *Id.* § 385.214(d).

²³ *Id.* § 385.213(a)(2).

B. Substantive Matters**1. Filing Rights under the TOA****a. Protests**

25. NECOS and the Joint Protesters argue that revisions to the Attachment F Implementation Rule are revisions to the regional rate and therefore must be filed jointly pursuant to section 3.04(b)(i)(A) of the TOA²⁴ rather than unilaterally pursuant to section 3.04(a)(i). The Joint Protesters add that all filings made pursuant to section 3.04(b) must be vetted through the stakeholder process specified in section 3.04(l), and point to Central Maine's use of the stakeholder process and attempt to win an advisory vote as evidence that its proposed revisions were considered regional rate changes within the scope of section 3.04(b). The Joint Protesters further argue that Central Maine's proposed revisions fall under section 3.04(b)(iii), which refers to filings that implement an incentive or performance-based rate proposal applicable to the entire New England

²⁴ Section 3.04(b)(i)(A) provides that:

(b) The [Participating Transmission Owners] acting jointly in accordance with the Disbursement Agreement among them, shall have the authority to submit filings under [s]ection 205 of the Federal Power Act to establish and to revise:

(i) the rates and charges for Transmission Service pursuant to which the revenue requirements for all Transmission Facilities of the [Participating Transmission Owner] used for the provision of Transmission Service are recovered; including the design of any rates or charges for: (A) regional Transmission Service on the New England Transmission System involving the use of more than one [Participating Transmission Owner's] Transmission Facilities; (B) Transmission Service between the New England Transmission System and any other transmission system; (C) Transmission Service through the New England Transmission System between other transmission systems; (D) the recovery of any portion of the revenue requirements of the [Participating Transmission Owners] attributable to the elimination of any rates or charges (e.g., border charges) for any such Transmission Service; (E) the methodology by which the costs of Transmission Upgrades related to generator interconnections are allocated under the [Tariff] and (F) the methodology by which the costs of New Transmission Facilities and Transmission Upgrades are allocated under the [Tariff].

Transmission System.²⁵ NECOS argues that apart from the limitations in the TOA, the Commission has previously rejected attempts by individual entities to unilaterally change an Independent System Operator or Regional Transmission Organization tariff.

26. The Joint Protesters argue that Central Maine's attempt to unilaterally revise the Attachment F Implementation Rule sets a dangerous precedent that could alter the balance of rights and obligations under the TOA. The Joint Protesters state that the TOA is the product of lengthy negotiations among ISO New England, transmission owners, and stakeholders, and note that when the Commission approved the TOA it granted *Mobile-Sierra*²⁶ protection to section 3.04.²⁷ The Joint Protesters note that if the Commission rejects the proposed revisions, Central Maine will recover CWIP through its local rates, which is how other New England transmission owners have recovered CWIP.

27. NEPOOL asserts that the proposed changes are regional rate changes within the meaning and intent of section 3.04(b), and states that it would object in the future if a transmission owner were to argue that a change in regional rates can be accomplished under section 3.04(a) of the TOA without a NEPOOL vote.²⁸ NEPOOL argues, however, that because Central Maine submitted its proposed changes for stakeholder input and an advisory vote, it followed the intent, if not the letter, of the TOA. Consequently, NEPOOL does not object to Central Maine's proposed changes in this case.

28. While the Joint Protesters agree with NEPOOL that the filing falls under section 3.04(b), they reject NEPOOL's implication that the Commission should

²⁵ Section 3.04(b)(iii) provides that:

(b) The [Participating Transmission Owner] acting jointly in accordance with the Disbursement Agreement among them, shall have the authority to submit filings under [s]ection 205 of the Federal Power Act to establish and to revise:

(iii) any rates or charges, and terms and conditions related thereto, that implement an incentive or performance-based rate proposal, applicable to the entire New England Transmission System.

²⁶ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

²⁷ Joint Protesters' Protest at 6 (citing *ISO New England Inc.*, 106 FERC ¶ 61,280, at P 129, *reh'g granted in part and denied in part*, 109 FERC ¶ 61,147 (2004) (*ISO New England*)).

²⁸ NEPOOL Comments at 5.

nevertheless accept it because Central Maine followed the intent of the TOA. The Joint Protesters claim that accepting an unauthorized filing would unravel the allocation of filing rights and undermine the consensus building function that the joint-filing requirement was intended to foster. If the Commission nevertheless decides to accept the filing, the Joint Protesters urge the Commission to clarify that its decision is limited to the specific circumstances of this case.

29. National Grid and Northeast Utilities indicate that they might seek to recover CWIP through the Regional Network Service rate for their projects if the Commission accepts Central Maine's filing.

30. In their protest of Central Maine's deficiency letter response, NECOS cite a vote by the NEPOOL Reliability Committee on May 19, 2009 to decline to recommend to ISO New England that it designate Central Maine's Project as a pool transmission facility for the purposes of regional cost allocation. NECOS argue that unless ISO New England takes affirmative action contrary to the May 19 vote, there is no basis for modifying the Attachment F Implementation Rule because the formula rate therein applies only to the recovery of costs for pool transmission facilities.

b. Commission Determination

31. We find that section 3.04(a)(i) allocates to Central Maine the right to submit unilateral section 205 filings that revise the Attachment F Implementation Rule. Central Maine's filing is, at its core, a proposal to revise its revenue requirement for its pool transmission facilities, and section 3.04(a)(i) gives individual transmission owners the unqualified right to unilaterally propose revisions to the revenue requirements for all of their transmission facilities. Consequently, Central Maine cannot unilaterally propose a revision to its revenue requirement for the Project without proposing a unilateral revision to the Attachment F Implementation Rule. Section 3.04(b)(i)(A), in contrast, does not purport to govern a transmission owner's right to file revisions to its revenue requirements; it refers instead to filings that propose to change the "design" of New England's Regional Network Service rate. Moreover, while it is possible to interpret section 3.04(b)(i)(A) to govern Central Maine's filing, to do so would require that we adopt a strained reading of the word "design," disregard the context of section 3.04(b), and violate longstanding principles of contract interpretation by effectively reading section 3.04(a)(i) out of the TOA.²⁹

²⁹ *Nicole Gas Production, Ltd.*, 105 FERC ¶ 61,371, at P 9 (2003) ("Like a contract, a tariff must be interpreted to give meaning to all provisions of the tariff."); *Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.*, 86 FERC ¶ 61,174, at 61,598 (1999) ("It is well established in contract law that a contract should be construed so as to give effect to all of its provisions and to avoid rendering any provision

(continued)

32. Section 3.04(a)(i) allocates to each individual transmission owner the right to unilaterally submit section 205 filings that establish and revise “the revenue requirements for all Transmission Facilities of such [Participating Transmission Owner] used for the provision of Transmission Service.”³⁰ In contrast, section 3.04(b)(i)(A) requires that the transmission owners file jointly, in accordance with the Disbursement Agreement³¹ among them, to establish or revise the rates and charges “pursuant to which the revenue requirements for all Transmission Facilities of [the Participating Transmission Owners] used for the provision of Transmission Service are recovered,” including the design of any rates or charges for regional transmission service involving the use of more than one transmission owner’s facilities.³²

33. While it could be argued that Central Maine’s filing seeks to revise the design of rates or charges for regional transmission service involving the use of more than one transmission owner’s facilities, we do not accept that view. The rate for Regional Network Service, which is a rate “for regional transmission service involving the use of more than one transmission owner’s facilities,” is calculated according to an equation that uses as an input the aggregate revenue requirement that is the sum of the individual revenue requirements calculated pursuant to the Attachment F Implementation Rule. While this aggregate revenue requirement does not by itself constitute the final rate for Regional Network Service (as it must still be divided by the aggregate monthly coincident peak), it is an element that constitutes that formula rate, as is the Attachment F Implementation Rule which itself is the filed formula rate that yields the individual revenue requirements that together constitute the aggregate revenue requirement. In this respect, it could be argued that the Attachment F Implementation Rule is part of the “design” of the rate for Regional Network Service.

meaningless.”); *DeNovo Oil & Gas Inc.*, 71 FERC ¶ 61,057, at 61,209 (1995) (rejecting interpretation that would “violate the rules of contractual construction which require that contracts be construed in a manner which gives meaning to each of its provisions.”); *Southern Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003) (rejecting interpretation that would render contract provisions superfluous, and stating “[c]ontracts must be read as a whole, with meaning given to every provision.”).

³⁰ *See supra* note 13.

³¹ The relevant section of the Disbursement Agreement merely paraphrases and points to section 3.04(b)(i)(A).

³² *See supra* note 24.

34. However, we find that this interpretation reads too little into the word “design.” In our view, the “design” of the Regional Network Service rate refers to the relationship among the variables that constitute the rate; that is, the method by which it is derived. The addition of Project CWIP as an input in the Attachment F Implementation Rule does not change the relationship among the variables that constitute the formula rate. The rate is still calculated pursuant to the same equation; it remains the ratio between the aggregate revenue requirement and the aggregate monthly coincident peak. Central Maine does not propose to change this relationship, which is a filed rate, in its filing; rather, it seeks to update its individual revenue requirement to reflect the Commission’s authorization of Project CWIP. The updated revenue requirement will continue to be aggregated with the revenue requirements of the other transmission owners and divided by the monthly coincident peak.

35. We find that section 3.04(b)(i)(A) is intended to apply to section 205 filings that would revise the formula, or design (in these sense of a general blueprint), for the Regional Network Service rate, not to filings that would revise or add a specific input for a single transmission owner within that design. This reading is consistent with the rest of section 3.04(b). Read as whole, section 3.04(b) applies to section 205 filings that propose generic revisions to the design of cost recovery mechanisms and cost allocation methodologies that apply to all transmission owners. Thus, section 3.04(b)(i)(B) requires a joint filing for proposals to revise the design of the rates and charges for transmission service between the New England transmission system and any other transmission system; section 3.04(b)(i)(C) applies to proposals to revise the design of the rates and charges for transmission service through the New England transmission system between other transmission systems; and sections 3.04(b)(i)(E) and (F) govern filings to revise the methodologies by which all transmission owners collect certain costs under the Tariff. Similarly, section 3.04(b)(ii)³³ governs filings that revise the methodology by which all transmission owners recover and allocate line losses, while section 3.04(b)(iii)³⁴ governs

³³ Section 3.04(b)(ii) provides that:

(b) The [Participating Transmission Owner] acting jointly in accordance with the Disbursement Agreement among them, shall have the authority to submit filings under [s]ection 205 of the Federal Power Act to establish and to revise:

(ii) the methodology for the recovery and allocation of the line losses on the New England Transmission System, if and to the extent that the calculation of locational marginal prices for energy is not designed to recover such losses[.]

³⁴ See *supra* note 25.

filings that seek to implement an incentive applicable to the entire New England transmission system. Each of these provisions governs filings that would revise rate structures or cost allocation methodologies that apply to all transmission owners.

36. Moreover, a finding that section 3.04(b)(i)(A) applies to Central Maine's filing would violate longstanding principles of contract interpretation by effectively reading section 3.04(a)(i) out of the TOA. Each provision of the TOA must be read to have meaning,³⁵ but a finding that section 3.04(b)(i)(A) governs Central Maine's Project CWIP filing would render section 3.04(a)(i) an empty letter. Section 3.04(a)(i) allocates to individual transmission owners the right to unilaterally submit section 205 filings that revise the revenue requirements for *all* of their transmission facilities. It does not qualify the right by distinguishing between those facilities eligible for regional cost allocation and those that are not; rather, it expressly applies to "all Transmission Facilities." The Attachment F Implementation Rule is the formula rate pursuant to which transmission owners must calculate their individual revenue requirements for transmission facilities eligible for inclusion in the Regional Network Service rate. Consequently, if transmission owners wish to revise their individual revenue requirements for such transmission facilities, they must revise the Attachment F Implementation Rule. If a transmission owner cannot unilaterally propose the necessary revisions, then it does not have the unqualified right granted by section 3.04(a)(i) to unilaterally revise the revenue requirements for all of its transmission facilities, and section 3.04(a)(i) is rendered meaningless. Moreover, a transmission owner would then be denied the opportunity to recover its legitimate costs.

37. In interpreting the TOA, we must choose an interpretation that gives a consistent meaning to all provisions, if possible.³⁶ Our interpretation of the TOA gives a consistent meaning to both section 3.04(a)(i) and section 3.04(b)(i)(A).

38. Additionally, the Commission will not find that an entity has given up its statutory rights absent a clear waiver.³⁷ Section 3.04 of the TOA is a voluntary arrangement that allocates section 205 filing rights among: (1) the transmission owners, acting

³⁵ See *supra* note 29.

³⁶ *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir. 1992) ("The entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency.").

³⁷ See *Sithe/Independence Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 76 FERC ¶ 61,285, at 62,458 (1996), *remanded on other grounds sub nom. Sithe/Independence Power Partners L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999).

individually, (2) the transmission owners, acting together, and (3) ISO New England.³⁸ The transmission owners are free to enter into such arrangements and to voluntarily give up all or part of their filing rights, which include the right to submit section 205 filings that revise their individual revenue requirements.³⁹ However, we will not presume that the transmission owners waived their rights in this case, where the alleged waiver (implicit in section 3.04(b)(i)(A)) stands in marked contrast to a competing provision (section 3.04(a)(i)) that is a clear and unqualified reservation of the right to unilaterally submit filings that revise “the revenue requirements for all Transmission Facilities . . . used for the provision of Transmission Service.” Consequently, we find that in crafting section 3.04(a)(i) of the TOA, the transmission owners preserved their right to unilaterally make section 205 filings like the rate application that Central Maine made for its Project’s CWIP in this proceeding.

39. The Joint Protesters assert that Central Maine’s filing is governed by section 3.04(b)(iii) of the TOA, which requires a joint filing for any proposal to establish or revise “any rates or charges, and terms and conditions related thereto, that implement an incentive or performance-based rate proposal, applicable to the entire New England Transmission System.” We disagree. The incentives authorized by the Commission in the October 2008 Order are not “applicable to the entire New England Transmission System;” they were authorized specifically for Central Maine’s Project based on the determination that the Project satisfied the requirements for incentives under Order No. 679 and section 219 of the Federal Power Act.⁴⁰ In our view, section 3.04(b)(iii) is intended to apply to cases like Opinion No. 489,⁴¹ where the Commission authorized an incentive on a New England wide-basis based on regional concerns and the regional development process.

40. We also reject NECOS’s suggestion that Central Maine’s rights under the TOA are unimportant. As we have explained, in crafting section 3.04(a)(i) of the TOA, the transmission owners preserved their statutory right to unilaterally make section 205 filings that revise their individual revenue requirements for all of their transmission facilities, including those eligible for regional cost allocation. While Central Maine may

³⁸ In *ISO New England*, 106 FERC ¶ 61,280 at P 72, the Commission found that the TOA was a voluntary allocation of filing rights permissible under *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).

³⁹ *Atlantic City*, 295 F.3d at 25.

⁴⁰ 16 U.S.C. § 824s (2006).

⁴¹ *Bangor Hydro-Electric Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh’g*, 122 FERC ¶ 61,265 (2008).

voluntarily relinquish its section 205 filing rights, the Commission cannot require it to relinquish them.⁴² Thus, contrary to NECOS' argument, we cannot override the TOA, which is a voluntary agreement that preserved the statutory right of all transmission owners, including Central Maine, to unilaterally submit section 205 filings that revise their revenue requirements.

41. Moreover, we reject NECOS' characterization of the May 19, 2009 NEPOOL Reliability Committee vote. The purpose of the Reliability Committee vote was not to designate Central Maine's Project as a pool transmission facility. Rather, the purpose of this vote was to advise ISO New England how much, if any, costs of a Reliability Benefit Upgrade should be allocated regionally. Under the Tariff, a facility is a pool transmission facility if it meets the technical specifications in section II.49 of the Tariff, which does not provide for advisory voting by NEPOOL committees. Not all pool transmission facilities, however, are eligible for regional cost allocation; only those facilities designated by ISO New England pursuant to Schedule 12 of the Tariff are eligible for regional cost allocation. ISO New England, not the NEPOOL Reliability Committee, makes the final determination of whether a facility is eligible for regional cost allocation.

42. Finally, in light of our finding that the transmission owners preserved their right under section 3.04(a) of the TOA to unilaterally file revisions to their own revenue requirements, and thus, to the Attachment F Implementation Rule, we find that the language in Attachment F of the Tariff specifying that *any change* to the Attachment F Implementation Rule must be approved by the Participating Transmission Owners Administrative Committee is unjust and unreasonable. Accordingly, pursuant to section 206 of the Federal Power Act, we direct ISO New England to revise Attachment F of the Tariff to remove the requirement that changes to the Attachment F Implementation Rule filed pursuant to section 3.04(a) of the TOA must be approved by the Participating Transmission Owners Administrative Committee and within sixty days of the date of this order, to submit a revised tariff sheet.

2. Commitment to Implement Incentives Only After the CPCN Proceeding

a. Protests

43. NECOS argue that the Commission should reject Central Maine's filing because in its petition for declaratory order seeking incentives it committed to refrain from including any incentives in its rates until the Project receives a Certificate of Public Convenience and Necessity (CPCN) from the Maine PUC, which has not yet occurred.

⁴² See *Atlantic City*, 295 F.3d at 21-26.

NECOS state that Central Maine's filing would allow it to collect rates based on estimates of future Project CWIP, notwithstanding that it appears increasingly remote that Central Maine will begin construction in 2009. NECOS argue that Central Maine's attempt to circumvent its previous commitment calls into question the protection from excessive or imprudent expansion of rate base provided to the 93 percent of New England transmission loads outside of Maine.

44. The Maine Parties agree that Central Maine reneged on its commitment, and contend that this type of bait-and-switch behavior from a utility can only undermine confidence in the Commission's interest in protecting consumers.⁴³

b. Commission Determination

45. We reject the protests. In its response to the deficiency letter, Central Maine states that it will not include CWIP in rate base until after it receives all required permits and certificates.⁴⁴ This statement is consistent with its commitment in its petition for declaratory order not to include CWIP in rate base until after it receives a CPCN.

3. Sufficiency of Filing

a. Initial Protests

46. The Maine Parties argue that Central Maine's filing fails to provide the information specified in section 35.13(h)(38) of the Commission's regulations and does not comply with the requirements in Order No. 298⁴⁵ for inclusion of CWIP in rate base, as required by the Commission in the October 2008 Order. The Maine Parties state that section 35.13(h)(38) requires a Statement BM that includes, inter alia, information about possible alternative projects. The Maine Parties assert that while Central Maine's filing is incomplete with respect to the relative cost of the Project and possible alternatives, these matters are under consideration in the CPCN proceeding; consequently, the Maine

⁴³ Maine Parties' Initial Protest at 15.

⁴⁴ Central Maine Deficiency Response at Tab 4 at 1 ("Once the required permits and certificates are in place, Central Maine plans to begin construction on the [P]roject. Central Maine will then transfer amounts that are currently in Account [No.] 183 to the applicable CWIP accounts (Account [No.] 107)).

⁴⁵ *Construction Work In Progress for Pub. Utils.; Inclusion of Costs in Rate Base*, Order No. 298, FERC Stats. & Regs. ¶ 30,455, *order on reh'g*, Order No. 298-A, FERC Stats. & Regs. ¶ 30,500 (1983), *order on reh'g*, Order No. 298-B, FERC Stats. & Regs. ¶ 30,524 (1983).

Parties claim that Central Maine would have more information for this filing if it had made it after the CPCN proceeding. The Maine Parties also contend that Central Maine's assertion that the Project is a Reliability Transmission Upgrade in ISO New England's Regional System Plan does not satisfy the requirements of Order No. 298.

47. NECOS argue that Central Maine failed to provide all the information required by section 35.13(h)(38) of the Commission's regulations, and note specifically the lack of information showing that CWIP-related costs will be placed into rates in furtherance of a least-cost supply. NECOS claim that compliance with this requirement is particularly important in this case because of the purported tendency of regulated utilities that receive revenue beyond their real cost of capital to expand plant beyond optimal levels to increase revenues through the excess return (the Averch-Johnson Effect).⁴⁶ NECOS allege that there are substantial indications that the \$1.5 billion cost of the Project indicates "gold plating" and reflects this tendency at work. To support its claim, NECOS cite testimony from the CPCN proceeding stating that the Project is not needed.⁴⁷ Consequently, NECOS argue that this case requires an enhanced level of vigilance and propose that the Commission require Central Maine to provide an ongoing demonstration that CWIP-related costs included in the regional rate are prudent and consistent with a least-cost supply program, as required by section 35.13(h)(38) of the Commission's regulations. At a minimum, NECOS argues that Central Maine should be required to provide a complete, transparent, and detailed annual CWIP filing sufficient to enable regional transmission customers to assess and verify the prudence and justness and reasonableness of the Project's CWIP.

b. Deficiency Letter, Central Maine's Response, and Subsequent Protests

48. In the deficiency letter, Commission staff directed Central Maine to: (i) provide a detailed cost schedule for the Project; (ii) identify alternatives to the Project and the costs of such alternatives; (iii) provide the needs assessment on which Central Maine based the Project and that it referenced in the filing; and (iv) demonstrate that the Project represents the least-cost alternative.

49. In its response, Central Maine submitted a cost schedule and estimating methodology showing that the Project's total anticipated cost through 2009 is \$102,303,201 and that the portion to be included in CWIP is \$73,611,427. Central Maine

⁴⁶ NECOS states that this tendency is known as the "Averch-Johnson Effect" after the authors of the initial literature on the subject.

⁴⁷ NECOS Initial Protest, Exhibit 4 at 5-8.

states that the difference between the Project's total anticipated cost and the portion expected to be assigned to CWIP results from removing the land costs assigned to FERC Account No. 105 (Plant Held for Future Use) and the cost for the South Gorham Substation autotransformers, which is included in the 2009 Plant in Service forecast.

50. Central Maine identified alternatives to the Project and the costs of such alternatives, asserting that the Project is the most cost-effective solution for the long-term reliability needs of Maine's bulk power system. To demonstrate this, Central Maine presented three separate studies:⁴⁸ a Needs Assessment and separate assessments of Transmission and Non-Transmission Alternatives.⁴⁹ Central Maine claims that these studies, along with the Project's inclusion in ISO New England's Regional System Plan, provide a firm basis for concluding that the Project is the least-cost alternative to meeting Maine's reliability needs and ensure that the costs incurred by Central Maine are prudent and consistent with a least-cost energy program.

51. Central Maine states that the Commission has acknowledged previously that a public utility seeking to include CWIP in rate base may be unable to provide a general statement of the utility's program for providing reliable and economic power, and in such instances has allowed the utility to instead submit any pertinent information upon which it relied in deciding to replace or expand its facilities. Central Maine states that since it does not have load-serving obligations and does not own or control any generation, it relied on ISO New England's regional planning process, which it describes in detail, and the resulting studies to determine whether to proceed with the Project. Central Maine argues that the Commission should accept the information provided about ISO New England's regional planning process, related Tariff requirements, and supporting studies as sufficient to fulfill section 35.13(h)(38) of the Commission's regulations. Central

⁴⁸ The Needs Assessment (Final Report, Maine Power Reliability Program, Needs Assessment of the Maine Transmission System) and the Transmission Alternatives Assessment (Final Report, Maine Power Reliability Program, Transmission Alternatives Assessment for the Maine Transmission System) were conducted under the direction of ISO New England.

⁴⁹ The Non-Transmission Alternatives Assessment (Non-Transmission Alternatives Assessment and Economic Evaluation of the Maine Power Reliability Program) found that the Project was more cost-effective than the most cost-effective non-transmission alternatives (such as efficiency, demand response, and generation) in all but one region. The study considered the cost of capital expenditures, locational marginal pricing, forward capacity market assumptions, demand side management, fuel prices, renewable energy, emission allowances, transmission congestion, and energy efficiency resources.

Maine claims that in *Northeast Utilities*⁵⁰ the Commission relied on ISO New England's regional planning process to find that the proposed projects were prudent. Central Maine renews its request for waiver of any requirements in section 35.13(h) that may be required for such a determination.

52. The Maine Parties and NECOS argue that Central Maine failed to cure the deficiencies in its filing. The Maine Parties assert that Central Maine submitted a cost summary consisting of forecasted CWIP-related expenditures through December 31, 2009 rather than a detailed cost schedule. The Maine Parties note that Central Maine's summary states that there are \$28.2 million in pre-2009 program costs. Since these costs are listed as "pre-2009," the Maine Parties assume that Central Maine has already spent this money and therefore can provide a detailed description of the costs. If Central Maine refuses, the Maine Parties argue that the Commission should reject the filing. Similarly, the Maine Parties argue that Central Maine has failed to explain the \$24.3 million in a category called "Estimated Power Engineers South Gorham costs." The Maine Parties claim that it is unclear whether Central Maine has already spent this money or if it expects to spend it after it receives a CPCN.

53. The Maine Parties also observe that while the spreadsheet included in the response estimates the costs of various components of the Project, none of these estimates are broken down into cost components, and therefore there is none of the information that is needed to determine the prudence of the expenditures. The Maine Parties further note that the various components in the spreadsheet all indicate that construction is not expected to begin until April 2010 (except for expansion of the Gorham substation, which Central Maine indicates is separate from the Project). Consequently, the Maine Parties conclude that Central Maine should not have requested that the rate filing become effective June 1, 2009, but should have waited until the CPCN case was concluded.

54. Additionally, the Maine Parties claim that there is a false precision in Central Maine's response because all of the components and estimates are based on the assumption that the Project will be approved as proposed in the CPCN proceeding. The Maine Parties describe this assumption as "guess work," and argue that the information provided by Central Maine is inherently deficient because it relies on cost estimates that can change. The Maine Parties state that without knowing the scope of the final Project it is impossible for Central Maine to provide detailed estimates and for ratepayers to question the prudence of future expenditures.

55. NECOS agree that Central Maine failed to include a sufficiently detailed cost schedule and argue that the Commission requires information indicating the actual

⁵⁰ 114 FERC ¶ 61,089 (2006).

amount of CWIP proposed to be recorded for each project, all related accounts (such as AFUDC and regulatory liability), all subaccounts, and the resulting effect of including CWIP in rate base on the revenue requirement. NECOS also argues that neither Central Maine's forecast of CWIP balances by year nor the scope of the Project used in that forecast appear to have been adjusted in any way to account for the pace of the currently ongoing CPCN proceedings, or for outcomes other than full approval of a CPCN for the Project as proposed.

56. The Maine Parties and NECOS also claim that Central Maine failed to identify alternatives to the Project and to demonstrate that the Project is the least-cost alternative. The Maine Parties assert that the fact that Central Maine does not engage in integrated resource planning cannot be understood to imply that the Maine PUC does not require a study of alternatives as part of a CPCN proceeding. The Maine Parties state that an examination of whether there are lower cost alternatives is a critical component of a CPCN proceeding. NECOS argue that the materials submitted in Central Maine's response rest on methodologies and assumptions that have been contested and are still under review in the CPCN proceeding. NECOS observe that, at the request of Maine PUC staff, the Maine Public Advocate, and other parties, Central Maine recently supplemented its Needs Assessment and alternatives studies with additional studies. NECOS contends that until the CPCN proceeding is resolved, the scope of Central Maine's Project remains unknowable and, consequently, Central Maine cannot show that the Project is the least-cost alternative.

57. Both the Maine Parties and NECOS challenge Central Maine's reliance on ISO New England's regional planning process and the Commission's decision in *Northeast Utilities*. The Maine Parties and NECOS argue that the Project's passage through the regional planning process does not guarantee that it is the least-cost alternative and cite recent statements by ISO New England confirming that it does not determine the relative costs and benefits of alternatives to transmission and does not advocate for the alternative with the lowest reasonable cost. The Maine Parties and NECOS also contend that *Northeast Utilities* does not support Central Maine's claim that the Project is the least-cost alternative because it was included in ISO New England's Regional System Plan. The Maine Parties and NECOS observe that the transmission projects in *Northeast Utilities* had already received state approval, which means that they had been thoroughly vetted and compared against alternatives.

c. Commission Determination

58. Section 35.13 of the Commission's regulations requires that a utility seeking to include CWIP in rate base submit a Statement BM, which requires the utility to describe its long-range program for providing reliable and economic power, include an assessment of the relative costs of adopting alternative strategies, and provide an explanation of why the program adopted is prudent and consistent with a least-cost energy supply program.

Commission staff and intervenors must be able to review the prudence of construction and related costs that may be included in rate base. One element of this prudence standard is the comparison of costs of alternative plans, along with technical and economic assumptions.⁵¹ We have found that “the least-cost principle [is] one important component of a prudence determination” and we have stated that “[we] intend to apply it to reviewing claimed construction costs as we do other claimed utility costs.”⁵²

59. In determining the prudence of specific costs, the appropriate test is whether the costs are those that reasonable management would have made in good faith, under the same circumstances and at the relevant point in time.⁵³ A prudence analysis must evaluate a utility’s decision on the basis of information available to the utility *at the time the decision is made*. We therefore make a case-specific finding of prudence in granting CWIP in rate base;⁵⁴ the “prudence of investment decisions and associated costs is a matter of fact in each case” and as such, the Commission must have the ability “to review and judge the prudence of those costs as those costs are incurred or claimed in rate base, rather than at a later point in time when a project has been abandoned and a potentially unwise investment has already been made.”⁵⁵

60. We find that Central Maine has demonstrated one component of this prudence determination. Central Maine has demonstrated that the Project is consistent with a least-cost energy supply program based on the studies submitted with its deficiency response and its commitment not to include CWIP in its rates until after it receives all required permits and certificates.⁵⁶ The Needs Assessment study⁵⁷ and Transmission Alternatives Assessment,⁵⁸ both of which were conducted under the auspices of ISO New England and vetted through the stakeholder process, demonstrate that the Project is the most economical *transmission* solution to Maine’s reliability needs. These studies examined

⁵¹ See Order No. 298, FERC Stats. & Regs. ¶ 30,455 at 30,516.

⁵² See *id.*; see also *Boston Edison*, 109 FERC ¶ 61,300 (2004); *American Transmission Co., L.L.C.*, 105 FERC ¶ 61,388 (2003), *order approving settlement*, 107 FERC ¶ 61,117 (2004); *Northeast Utilities Services Co.*, 114 FERC ¶ 61,089.

⁵³ *Violet v. FERC*, 800 F.2d 280, 283 (1st Cir. 1986).

⁵⁴ *Empire District Electric Co.*, 58 FERC ¶ 61,037 (1992).

⁵⁵ See Order No. 298, FERC Stats. & Regs. ¶ 30,455 at 30,516.

⁵⁶ See *supra* note 45.

⁵⁷ Central Maine Deficiency Response at Ex. No. C.

⁵⁸ *Id.* at Ex. No. 1.B.1.

18 different reliability scenarios and approximately 275 NERC Category B and C contingencies and considered more than ten different transmission and non-transmission alternatives. Moreover, the Non-Transmission Alternatives Assessment⁵⁹ found that the Project is a more economical solution to Maine's reliability needs than non-transmission alternatives, such as efficiency, demand response, and generation alternatives.⁶⁰ These studies have been submitted to ISO New England, reviewed by the ISO New England Planning Advisory Committee (which is comprised of a wide variety of regional stakeholders, including transmission owners, transmission customers, market participants, and governmental representatives), and vetted through market participants before the Project's inclusion in the 2008 Regional System Plan.⁶¹

61. In any event, Central Maine states that it will not include CWIP in rate base until after it receives all required permits and certificates.⁶² Consequently, a return on CWIP costs will not be passed through to customers until after Central Maine receives a CPCN. We have previously accepted tariff sheets that CWIP in rate base subject to the outcome of a state certification process,⁶³ and we do so here.⁶⁴

62. However, as the Maine Parties and NECOS correctly point out, there is an additional requirement associated with the prudence review of Central Maine's

⁵⁹ See *supra* note 50.

⁶⁰ Non-Transmission Alternatives Assessment and Economic Evaluation of the Maine Power Reliability Program, Ex. No. 1.B.2.

⁶¹ Central Maine Deficiency Response at 3-6.

⁶² See *supra* note 45.

⁶³ See *Xcel Energy Services Co.*, 121 FERC ¶ 61,284, at P 53 (2007); *Trans-Allegheny Interstate Line Co.* 119 FERC ¶ 61,219, *order on reh'g*, 121 FERC ¶ 61,009 (2007); *Pepco Holdings, Inc.*, 125 FERC ¶ 61,130 (2008); *Public Service Electric & Gas Co.*, 126 FERC ¶ 61,219 (2009) (granting modification to the formula rates to permit 100 percent CWIP in rate base where the construction start date was estimated and before the completion of the CPCN proceeding).

⁶⁴ Moreover, with respect to CWIP, we have previously found that the "Averch-Johnson" effect is flawed because CWIP in rate base will have no effect on earned rates of return, and the Averch-Johnson effect is alleged to occur only if earned rates of return exceed the opportunity cost of capital. See Order No. 298, FERC Stats. & Regs. ¶ 30,455 at 30,517.

construction costs.⁶⁵ Specifically, we have previously determined that recovery of CWIP on a formulary basis is not permitted without prior Commission review of the cost schedules. In Order No. 679, we allowed public utilities to propose a method to limit this CWIP-related formula rate filing obligation to once a year.⁶⁶ We have also previously permitted applicants to propose this methodology on compliance, and we will do so here.⁶⁷ Consequently, Central Maine is hereby ordered to submit, within sixty days of the date of this order, a compliance filing specifying a method for fulfilling this filing obligation. This filing should explain Central Maine's specific methodology for providing parties with an annual report of the construction costs. These annual reports should be in the same detail that we found acceptable in *Maine Yankee* and other cases, and consistent with Order No. 679, will not subject Central Maine to a comprehensive rate review.⁶⁸

63. Finally, NECOS argues that the Project is not needed. However, NECOS bases its argument on the testimony of a single witness in the CPCN proceeding, which is still pending; it ignores that, as a Reliability Transmission Upgrade in ISO New England's Regional System Plan, the Project has already been subjected to high degree of scrutiny and a review that accounts for the interests and input of each sector and state in New England. The Project was submitted to ISO New England, reviewed by the ISO New England Planning Advisory Committee (which is comprised of a wide variety of regional stakeholders, including transmission owners, transmission customers, market participants, and governmental representatives), and vetted through market participants.⁶⁹

4. Accounting Procedures

a. Initial Protests

⁶⁵ While Central Maine has provided estimated cost schedules in its response to the deficiency letter, we agree with the protesters that these estimated cost schedules may change dramatically during the course of this multi-year project, particularly when the Project is still undergoing the regulatory siting approval process.

⁶⁶ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 121 (citing *Maine Yankee Atomic Power Co.*, 66 FERC ¶ 61,375, at 62,252-53 & n.10 (1994) (*Maine Yankee*)).

⁶⁷ *Duquesne Light Holdings, Inc.*, 118 FERC ¶ 61,087 (2007).

⁶⁸ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 121.

⁶⁹ Central Maine Deficiency Response at 3-6.

64. The Maine Parties argue that the Commission's regulations do not allow Central Maine to recover CWIP prior to beginning construction on the Project, and that construction cannot begin unless and until the Project receives a CPCN from the Maine PUC. The Maine Parties note, however, that Central Maine's projected CWIP balance for calendar year 2009 is \$123.2 million. The Maine Parties argue that this expenditure is improper because Central Maine lacks the required authority to begin construction and has failed to provide any documentation to support this amount.

65. The Maine Parties state that it is possible that some of the \$123.2 million represents pre-certification costs that have been carried over from previous years, such as the cost of preliminary studies, but that it is impossible to tell because Central Maine has failed to provide the necessary documentation. The Maine Parties state that under the Commission's accounting procedures, pre-certification costs (Account No. 183) can be transferred to CWIP (Account No. 107) only if construction actually results. The Maine Parties contend that since construction has not started and cannot start unless and until the Maine PUC grants a CPCN, Central Maine is in violation of the Commission's approved accounting procedures to the extent that any pre-certification costs are included in the \$123.2 million. The Maine Parties argue that any pre-certification costs included in the \$123.2 million must be removed and left in Account No. 183.

66. The Maine Parties state that the Commission has authorized means other than CWIP for the recovery of pre-certification expenses prior to construction. For example, the Maine Parties suggest that Central Maine request treatment of pre-certification costs as a regulatory asset, which would allow Central Maine to accrue a carrying cost similar to AFUDC, or that Central Maine seek to expense pre-certification costs.

b. Deficiency Letter, Central Maine's Response, and Subsequent Protests

67. In the deficiency letter, Commission staff requested that Central Maine provide information about its accounting for pre-certification costs, including whether any such costs are included in forecasted CWIP amounts and a justification for any transfers of pre-certification costs to other accounts such as Account No. 107.

68. In its response, Central Maine states that its pre-certification costs are currently assigned to either Account No. 183 (Preliminary Survey and Investigation Charges) or Account No. 105 (Electric Plant Held for Future Use). Central Maine indicates that amounts recorded in Account No. 183 include costs associated with state, federal, and ISO New England permitting and certification, engineering, legal costs, and general program management, while the costs assigned to Account No. 105 are associated with acquiring real estate for the Project. Central Maine states that none of these costs are included in Account No. 107 (Construction Work in Progress), and consequently, it has not accrued AFUDC on the costs recorded in Account Nos. 183 or 105.

69. Central Maine states that a portion of the costs recorded in Account No. 183 that it expects to transfer to Account No. 107 by the end of 2009 are currently included in its forecasted Project CWIP. However, Central Maine states that it does not plan to begin construction on the Project until after it receives the required state and local permits and certificates, which it anticipates receiving by the end of 2009. Central Maine explains that after it receives the permits and certificates it will estimate the total cost for each component of the Project, calculate an allocation factor based on each component's percentage of the Project's total cost, and allocate the pre-certification costs in Account No. 183 to Account No. 107 based on the allocation factors assigned to the components with completed detailed designs. Central Maine indicates that any project component without detailed designs will not be assigned an allocation of the pre-certification costs until those designs have been issued. Central Maine further states that unallocated pre-certification costs will remain in Account No. 183 and will not accrue any AFUDC until the designs are issued and the costs are transferred to Account No. 107. Central Maine states that once CWIP costs are included in rates it will discontinue accruing AFUDC on any costs included in Account No. 107.

70. Central Maine states that the Commission's Uniform System of Accounts allows utilities to transfer funds from Account No. 183 to Account No. 107 when construction begins. Central Maine contends that utility accounting practices consider the detail design phase of a project to constitute the beginning of construction, and as such, its proposed method of transferring funds is consistent with the Uniform System of Accounts.

71. The Maine Parties argue that Central Maine's response fails to provide the required information. The Maine Parties note that the response indicates that the amount of costs expected to be transferred to Account No. 107 from Account No. 183 by the end of 2009, and currently included in Central Maine's forecasted CWIP, is \$123.2 million. The Maine Parties contend that this amount is inconsistent with the total estimated CWIP amount of \$73,611,427, and therefore, that it is unclear what amount is currently in Account No. 183, what amount Central Maine intends to transfer to Account No. 107 once construction begins, and what are the purposes of these expenses.

72. The Maine Parties also claim that Central Maine failed to justify recording such costs prior to the start of construction. The Maine Parties argue that nothing in the text accompanying Account Nos. 107 or 183 permits a utility to consider the "detailed design phase" of a project as the start of construction. The Maine Parties claim that the plain language accompanying Account No. 183 allows a utility to roll pre-certification costs into Account No. 107 only if construction results, which will be unknown until the conclusion of the CPCN proceeding.

c. Commission Determination

73. We find that Central Maine's filing satisfies the Commission's accounting requirements for CWIP included in rate base. Order No. 679 and section 35.25 of the Commission's regulations require a utility requesting to include CWIP in its rate base to propose accounting procedures that ensure that customers will not be charged for both capitalized AFUDC and corresponding amounts of CWIP in rate base. To comply with this requirement, Central Maine states it will use the SAP plant accounting system to maintain its accounting records for CWIP electric plant assets both during construction and after the project is placed in service. Central Maine states that the accounting system provides the controls and capability to separately identify and track all work orders specific to the Project so that no AFUDC will be capitalized once CWIP is included in rate base. Moreover, Central Maine states that construction work orders subject to the CWIP incentive treatment will be identified in SAP and no AFUDC will be calculated on their balances, once the CWIP balance is included in rate base. Central Maine states that these procedures will prevent any over or double-recovery of CWIP and capitalized AFUDC on the same rate base items. Based on these statements, we agree with Central Maine and find that its proposed accounting sufficiently demonstrates that it has accounting procedures and internal controls in place to prevent the accrual of AFUDC on CWIP amounts included in rate base.

74. We also reject the Maine Parties' claim that Central Maine's proposed accounting for pre-certification costs is inconsistent with the accounting requirements of the Uniform System of Accounts. The Maine Protesters allege that Central Maine intends to transfer amounts recorded in Account No. 183 to Account No. 107 before the Project receives a CPCN and to recover CWIP when it begins the "detailed design phase" of the Project. However, in its response to the deficiency letter, Central Maine specifically states that it does not plan to begin construction on the project until it receives the required state and local permits and certificates necessary for construction.⁷⁰ Consequently, Central Maine commits that no construction costs will be included in Account No. 107 until after the Project receives a CPCN. Moreover, Central Maine states that it will not begin allocating pre-certification costs recorded in Account No. 183 to Account No. 107 until after it is granted a CPCN.

75. With respect to Central Maine's suggestion that the "detailed design phase" constitutes the start of construction, we clarify that the design phase is not, by itself indicative of the start of construction. We also reject the Maine Parties' assertion that construction amounts are transferrable to Account No. 107 from Account No. 183 only when construction results. In general, under the Commission's accounting regulations a

⁷⁰ See *supra* note 45.

public utility may transfer costs on construction projects from Account No. 183 to Account No. 107 and may begin accruing AFUDC on such costs when the costs are continuously incurred on a planned progressive basis.⁷¹

76. In the instant case, Central Maine has not provided information indicating that it is currently incurring construction related costs on a planned progressive basis. Consequently, Central Maine's pre-certification costs are appropriately recorded in Account No. 183 until construction related costs are continuously incurred on a planned progressive basis. In its response to the deficiency letter, Central Maine states that it will not transfer pre-certification costs to Account No. 107 prior to receiving a CPCN and completing its detailed design process for the individual projects. We accept Central Maine's accounting proposal, based on its declaration that it will not transfer the costs to Account No. 107 prior to receiving a CPCN and completing its detailed design process and including the following conditions: 1) Central Maine must be incurring costs related to construction activities on a planned progressive basis at the time that it transfers amounts from Account No. 183 to Account No. 107; and 2) Central Maine must cease accruing AFUDC on the amounts when CWIP is included in rate base or, prior to including the costs in rates, during delays in construction or periods when it does not incur construction costs on a continuous planned progressive basis.

77. We further note that public utilities that receive a current return on CWIP recover this cost in a different period than when the cost would ordinarily be charged to expense under the general requirements of the Commission's Uniform System of Accounts.⁷² To promote comparability of financial information between entities, the Commission has required a specific accounting treatment or the use of footnote disclosures to recognize the economic effects of having CWIP in rate base.⁷³ Consequently, we accept Central Maine's proposal to use footnote disclosures.

78. The Commission directs Central Maine to provide footnote disclosures in the notes to the financial statements of their annual FERC Form No. 1 and their quarterly

⁷¹ See, e.g., *New York Regional Interconnect, Inc.*, 124 FERC ¶ 61,259 (2008).

⁷² The Uniform System of Accounts requires AFUDC to be capitalized as a cost of a construction project and depreciated over the service life of the asset.

⁷³ See, e.g., *American Transmission Company LLC*, 105 FERC ¶ 61,388 (2003), *order on reh'g*, 107 FERC ¶ 61,117 (2004); *Trans-Allegheny Interstate Line Co.*, 119 FERC ¶ 61,219, *order on reh'g*, 121 FERC ¶ 61,009 (2007); *Tallgrass*, 125 FERC ¶ 61,248; *Pepco*, 125 FERC ¶ 61,130.

FERC Form No. 3-Q which (1) fully explain the impact of the transmission rate incentives it receives insofar as the incentives provide for a deviation from the general requirements of the Uniform System of Accounts; (2) include details of amounts not capitalized because of the transmission rate incentives for the current year, the previous two years, and the sum of all years; and (3) include a partial balance sheet consisting of the Assets and Other Debits section of the balance sheet to include the amounts not capitalized because of the transmission rate incentives.

5. Possibility of Withdrawal from ISO New England

a. Protest

79. NECOS argue that the Commission should consider Maine's potential withdrawal from ISO New England as a factor in its decision whether or not to accept Central Maine's filing. NECOS explain that Maine's legislature directed the Maine PUC to develop an "exit strategy" for separation from ISO New England in the event that Maine is unsuccessful in advancing certain changes to ISO New England. NECOS claim that the prospect of Maine's withdrawal from ISO New England creates the possibility that New England transmission customers will have to pay CWIP for a Project that they might not use and, irrespective of whether that possibility comes to fruition, gives Central Maine unique and undue leverage in ongoing negotiations over possible revisions to the TOA and related agreements.

80. NECOS argue that the potential harm to New England transmission customers of paying for a project not yet in service that is removed from the regional transmission arrangement before it enters into service cannot be remedied by the forward looking allocation ratio typically required under the Commission's CWIP regulations, and that without fully mitigating the potential harm, it is unjust and unreasonable for the Commission to accept Central Maine's filing. NECOS contend that the harm could be mitigated by joint ownership of the Project, deferral by the Commission of action on Central Maine's proposal to recover CWIP in the regional rate until Maine reaches a definitive decision about Central Maine's continued participation in the current rate structure, or an explicit and guaranteed condition that makes Central Maine responsible, in the event of its departure from current regional transmission arrangements, for the refund of CWIP related to facilities that are not in commercial operation at the time of the departure.⁷⁴

⁷⁴ NECOS Initial Protest at 12.

b. Commission Determination

81. We reject NECOS' protest. Because Central Maine has not instituted withdrawal proceedings, the issue is not properly before us and we decline to prejudge this issue here. Therefore, there is no need to address NECOS' objection.

6. Recovery of ROE Incentive in Local Rates

a. Protests

82. The Maine Parties object to Central Maine's proposal to revise Schedule 21-CMP to permit local recovery of the 125 basis point ROE adder on portions of the Project that do not qualify for inclusion in the regional rate. The Maine Parties contend that Central Maine lacks authority to recover the ROE adder from local customers and that nothing in the October 2008 Order indicates that Central Maine can go beyond implementing the CWIP incentive and recover the ROE adder from local ratepayers. The Maine Parties argue that the proposed revision is unjust and unreasonable because it allows Central Maine to recover disallowed regional costs from local ratepayers without any hearing to determine whether these costs should be borne by local ratepayers.

83. The Massachusetts Parties argue that the Commission should reject Central Maine's attempt to implement any portion of the 125 basis point ROE adder until the Commission issues a final and non-appealable order on pending requests for rehearing. In the alternative, the Massachusetts Parties argue that the Commission should suspend the proposed tariff changes to provide for a refund should the Commission modify the October 2008 Order on rehearing.

b. Commission Determination

84. We reject the protests and accept the tariff sheets, subject to the outcome of the proceeding in Docket No. EL08-74-001.⁷⁵ Local recovery of the ROE incentive is consistent with how ISO New England will allocate the Project's costs. Pursuant to Schedule 12 of the Tariff, ISO New England will determine which aspects of the Project are eligible for regional cost allocation and which aspects are not. Just as it is just and reasonable for regional customers to pay for aspects of the Project that provide regional benefits, it is just and reasonable for local customers to pay for those aspects of the Project that provide only local benefits.

⁷⁵ In this proceeding, the Commission is considering requests for rehearing of the October 2008 Order, including requests to reconsider the size of the ROE incentive authorized by the Commission.

85. We have previously required a tracking of costs allocated regionally and costs allocated locally to ensure that customers who are not ultimately responsible for the costs do not pay. Consequently, we direct Central Maine to track the costs charged to the Local Network Service Rates to ensure that local customers are charged only for those portions of the Project from which they benefit exclusively, as determined by ISO New England pursuant to Schedule 12 of the Tariff. Moreover, we direct Central Maine in its annual informational CWIP filing discussed above, to include the allocation of these costs among regional and local customers.⁷⁶ These steps will ensure that customers have the opportunity to verify that Central Maine's cost allocation is consistent with ISO New England's cost allocation under Schedule 12 of the Tariff.

7. Waiver

a. Protest

86. The Maine Parties argue that the Commission should deny Central Maine's request for a waiver of the requirements of section 35.13(h) of the Commission's regulations as a collateral attack on the October 2008 Order, and in the alternative, as untimely because it was not made on the date of the original filing. The Maine Parties argue that Central Maine's request appears to be motivated by concern that the Commission will find its deficiency letter response inadequate. The Maine Parties contend that this concern does not justify granting waiver of a condition that allows consumers an opportunity to question whether expenditures being placed in rate base are prudently incurred.

b. Commission Determination

87. We deny Central Maine's request for waiver of the requirement in section 35.13(d)(6) of the Commission's regulations⁷⁷ to file an attestation, and we will require the attestation of a corporate officer to verify cost of service statements and supporting data made by Central Maine. We will grant waiver of the requirement in section 35.13 to provide full Period I and Period II data, and section 35.13(a)(2)(iv). The filing by the Central Maine is to recover CWIP through an existing formula rate using FERC Form No. 1 data and, therefore, full Period I and Period II data are not needed to evaluate this proposal.

⁷⁶ See *supra* note 66.

⁷⁷ 18 C.F.R. § 35.13(d)(6) (2009).

8. Effective Date**a. Protest**

88. The Maine Parties argue that, because the deficiency letter stated that Central Maine's response would establish a new filing date, assuming for the sake of the argument that the response cured the deficiency, the new filing date would be June 8, 2009, and the requested effective date of June 1, 2009 would be impermissible under the Federal Power Act because it would predate the filing date for the proposed tariff changes. Since Central Maine stated that the proposed revisions must be effective June 1, 2009 in order to be included in 2009 rates, the Maine Parties argue that the Commission should reject the filing.

b. Commission Determination

89. We reject the protest. The Maine Parties confuse the filing date and the effective date. The filing date establishes the Commission's statutory obligation to act within sixty days of the date of a section 205 filing. Submission of a response to a deficiency letter "resets the clock" with respect to the Commission's statutory obligation; it does not determine when an entity's filing can be made effective, as the Commission has the ability to allow an effective date earlier than after sixty days' notice.⁷⁸

The Commission orders:

(A) Central Maine's tariff sheets are hereby accepted for filing, effective June 1, 2009, as requested, as discussed in the body of this order.

(B) Central Maine is hereby directed within 60 days of the date of this order to submit an attestation and compliance filing, as discussed in the body of this order.

(C) Central Maine is hereby directed to provide footnote disclosures in their FERC Form No. 1 and their quarterly FERC Form No. 3Q, as discussed in the body of this order.

⁷⁸ 16 U.S.C. § 824d (2006).

(D) Pursuant to section 206 of the Federal Power Act, ISO New England is hereby directed to revise Attachment F of the Tariff and to submit a revised tariff sheet within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.